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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1952

No. 452

MOTOROLA, INC., a corporation,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

IRVING A. JENNINGS
619 Title & Trust Building
Phoenix, Arizona
Attorney for Petitioner

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In the Supreme Court
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No._____

MOTOROLA, INC., a corporation,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States of America:

Motorola, Inc., an Illinois corporation, prays that a writ of Certiorari issue to review the decision of the Court of Appeals for the Ninth Circuit entered on September 30, 1952 (R. 426), enforcing an order of the Board against Motorola, Inc. (R. 54-57).

OPINIONS BELOW

The opinion of the Court of Appeals (R. 426-437) is not yet reported. The findings of fact, conclusions of law, and order of the Board (R. 18-44; 54-57) are reported at 94 N.L.R.B. 1163.

BASIS OF JURISDICTION

The judgment of the Court of Appeals was entered on September 30, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and Section 10(e) and (f) of the National Labor Relations Act as amended.

QUESTIONS PRESENTED

The questions presented are:

(a) A petition for certification having been filed pursuant to Section 9(c) of the Act, is an employer entitled to certification by the Board of a representative of its employees chosen as such in a Board ordered election pursuant to Section 9 of the Act before it can be held to have refused to bargain in violation of Section 8 (a) (5) of the Act?

(b) A petition for certification having been filed pursuant to Section 9(c) of the Act, may an order of the Board directing an employer to recognize the union as an exclusive bargaining agent of its employees in violation of Section 8 (a) (5) of the Act be enforced without such representative's having been chosen in a Board ordered election for that purpose?

STATUTE INVOLVED

The statutory provisions principally involved are Sections 8 (a) (5), 9 (c) (1) (A) and 9 (c) (1) (B) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*). The pertinent provisions are set out in the Appendix, *infra*, p. i.

STATEMENT*

On July 10, 1950, a Business Representative of International Association of Machinists, District Lodge No. 49, called upon the Vice-President of the Company at its Phoenix, Arizona, plant (R. 27). The union representative requested recognition as the exclusive bargaining agent for the machinists employed by the

*The testimony was in sharp conflict on many factual issues, but the facts set forth in this statement are predicated upon the findings of the Board.

Company (R. 27-28). A majority of the employees in question had authorized the union to represent them prior to July 10, 1950 (R. 27). The Company representative informed the union that an answer to the request for bargaining rights would be forthcoming within ten days (R. 28). On July 12, 1950, Piper, the Director of Human Relations of the Company in Chicago, arrived in Phoenix at the request of the Vice-President as a result of the union demand and in connection with a wage review. Piper interviewed each of the employees in the appropriate unit, discussed at a meeting of all employees the Company personnel program, and advised the employees of forthcoming wage increases. Wage increases were instituted on July 17, 1950, and employees in the appropriate unit were granted increases retroactive to June 19, 1950 (R. 29). The Board found as a fact that wage increases of some kind were under consideration in June, 1950, before the union made its demand for recognition, and had not the union appeared on July 10, 1950, some increases would have been granted within a reasonably short period (R. 33). The union representative learned of the proposed wage increases on July 14, 1950, and called the Company to advise that in view of the union demand the wage increases were unethical. The Company replied it would be unethical to withhold a wage increase which had already been scheduled (R. 29).

On July 18, 1950, the union filed a representation petition pursuant to Section 9 (c) of the Act (R. 31, 77). On July 22, 1950, the union representative called upon the Company attorney, requested recognition and suggested that the Company consent to an election. The Company refused to consent to an election (R. 30-31).

On July 31, 1950, the union filed a charge with the Board alleging that the Company had refused to bargain with the union in violation of Section 8 (a) (5) of the Act (R. 1-2). There-

after the Board permitted the union to withdraw its representation petition previously filed on July 18, 1950, pursuant to Section 9 (c) of the Act (R. 77).

On October 3, 1950, the union filed its First Amended Charge against the Company (R. 3) alleging again that the Company had refused to bargain in violation of Section 8 (a) (5) of the Act. On October 19, 1950, the Board issued its Complaint against the Company alleging, *inter alia,* that the Company had refused to bargain with the union as the exclusive representative of an appropriate unit of the Company's employees in violation of Section 8 (a) (5) of the Act.

Thereafter the Company answered the Complaint in which it denied that the unit of employees described in the Complaint was an appropriate unit for purposes of collective bargaining; denied the majority status of the union; and denied it had at any time refused to bargain collectively in violation of the Act (R. 10-14; 19). Pursuant to notice, a hearing was held in Phoenix, Arizona from November 13 through 16, 1950, before a Trial Examiner (R. 19).

On January 5, 1951, the Trial Examiner issued his Intermediate Report and Recommended Order (R. 18-43). The Company in due course filed with the Board its exceptions to the Intermediate Report and Rulings of the Trial Examiner (R.45-53). Among other things, the Company excepted to the failure of the Trial Examiner to recommend that before the Company has a duty to bargain with the union, the union must first be designated as the majority representative of the employees in a Board-conducted election of a unit found to be appropriate pursuant to Section 9 of the Act (R. 51-52).

The Board entered its Decision and Order on June 12, 1951 (94 N.L.R.B. 1163), adopting the findings, conclusions and recommendations of the Trial Examiner with but one addition and

one modification immaterial herein (R. 54-57). By its Decision and Order the Board held that the Company had refused to bargain in violation of Section 8 (a) (5) of the Act and ordered the Company to bargain, upon request, with the union.

On June 25, 1951, the Company petitioned the United States Court of Appeals for the Ninth Circuit for a review of the Decision and Order of the Board (R. 410-413), and on August 27, 1951, the Company filed its Statement of Points on which it intended to rely in the proceedings before the Court of Appeals (R. 416-420). Included in the Statement of Points was the position of the Company that it was entitled, as a matter of law and pursuant to Section 9 (c) (1) (B) of the Act to a certification by the Board of the representative designated for the purposes of collective bargaining by the majority of the employees in an appropriate unit.

The Court below sustained the findings of the Board that the Company had refused to bargain in violation of Section (8) (a) (5) of the Act.

REASON FOR GRANTING THE WRIT

The Court of Appeals for the Ninth Circuit has decided an important question of Federal law which has not been but should be settled by this Court.

The 1947 amendments to the National Labor Relations Act (generally referred to as the Taft-Hartley Act) makes mandatory a representation hearing to determine whether a question of representation affecting commerce exists whenever a labor organization or an employer files a petition for certification of the bargaining agent of employees under Section 9 (c) of the amended Act. Upon such petition's having been filed the statute also makes it mandatory that the Board investigate such matter, and if it finds that a question of representation is involved, the Board is required to direct an election among employees to determine the question

of representation. The Circuit Court of Appeals held, notwithstanding these plain provisions of the Act, that if an employer is charged with the unfair labor practice of a refusal to bargain in violation of Section 8 (a) (5) of the Act, then the Board is relieved of its statutory obligation to hold a representation hearing and election pursuant to Section 9 (c) of the Act. These particular provisions of the Act have not been construed or settled by this Court.

No single phase of the national economy has achieved greater importance than a clear definition of the rights of employer and employee under the Acts of Congress. These rights should be clearly determined by the Court of last resort.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit should be granted.

Dated, Phoenix, Arizona,
November 12, 1952.

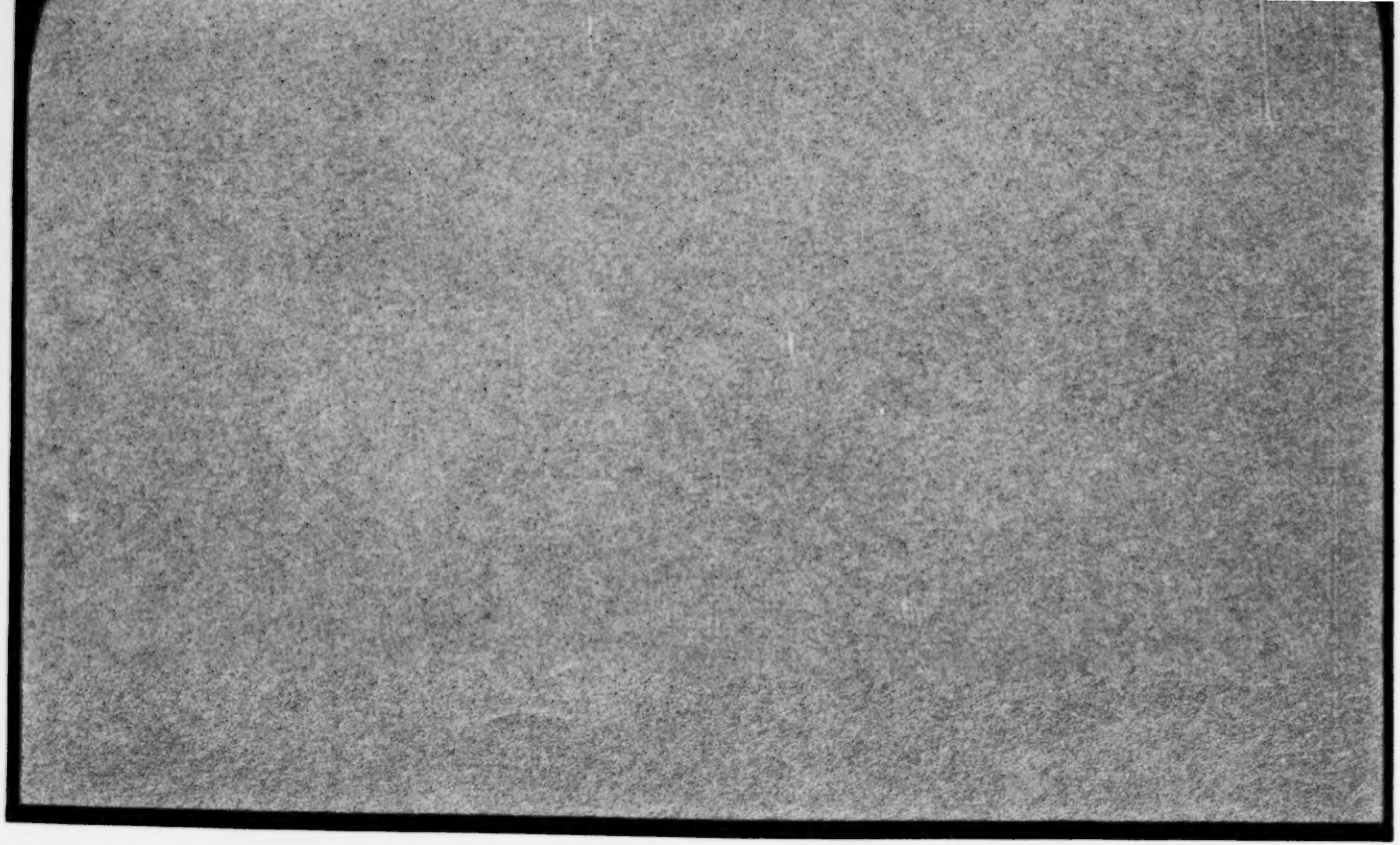
IRVING A. JENNINGS,
Attorney for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that I am attorney for Petitioner herein and that in my judgment the foregoing petition for a writ of certiorari is well founded and that it is not interposed for delay.

Dated, Phoenix, Arizona,
November 12, 1952.

IRVING A. JENNINGS,
Attorney for Petitioner



In the Supreme Court

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OCTOBER TERM, 1952

No.....

MOTOROLA, INC., a corporation,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,

BRIEF IN SUPPORT OF PETITION

BASIS OF JURISDICTION

The judgment of the Court of Appeals was entered on September 30, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and Section 10 (e) and (f) of the National Labor Relations Act as amended.

STATEMENT OF CASE

A full statement of the case is set forth in the petition for writ of certiorari and for the sake of brevity will not be repeated here.

SPECIFICATION OF ERRORS

The Court below erred:

1. In holding that the Company had refused to bargain with the union in violation of Section 8 (a) (5) of the Act in the absence of a certification by the Board of the representative of its employees chosen as such in an ordered election in an appropriate unit pursuant to Section 9 (c) of the Act.

2. In enforcing paragraphs 1 (a) and 2 (a) of the Board's Order.

SUMMARY OF ARGUMENT

To present concisely the questions here involved, the following facts are pertinent:

On July 10, 1950, a union representative appeared at the office of petitioner in Phoenix, and in conference with petitioner's managing officer asserted his authority to speak for a majority of the employees in a specified unit and requested that his union be recognized as the exclusive bargaining agent for all employees in such unit. In brief he was advised that an answer to such request would be forthcoming within a period of ten days. On July 17, 1950, a unilateral increase in wages was granted to all employees in the Phoenix plant, including employees in the unit involved. Thereafter and on July 18th, having knowledge of such wage increase, the union filed a petition with the National Labor Relations Board requesting a certification as the exclusive bargaining agent for the employees of petitioner in such unit. On July 31st the union charged petitioner with the unfair labor practice of refusing to bargain in violation of Section 8 (a) (5) of the Act. Upon this charge a complaint was later filed, hearing held and decision rendered. Thereafter the Board granted, without prejudice, the union's request to withdraw its petition for certification as its exclusive bargaining agent. This action was taken without notice to petitioner.

Prior to the 1947 amendments (generally known as the Taft-Hartley Act) the National Labor Relations Board adopted a policy of holding in abeyance a petition for certification when a charge of unfair labor practices intervened. Exceptions were made to this policy at the discretion of the Board. *Columbia Pictures Corp.*, 81 N.L.R.B. 1313, 23 L.R.R.M. 1504 (1949). Petitioner here asserts, and that is the sole question of law here presented, that under Section 9 (c) of the Act as amended, once the jurisdiction of the National Labor Relations Board is invoked by filing a representation petition under such Act, the duty of the Board is mandatory and it must process such petition.

The legal position of petitioner may be summarized by the following propositions:

1. A petition for certification having been filed pursuant to Section 9 (c) of the National Labor Relations Act, as amended, an employer may not be found guilty of violating Section 8 (a) (5) of the Act in the absence of a certification by the Board of a representative of its employees chosen as such in a Board ordered election.

2. A petition for certification having been filed pursuant to Section 9 (c) of the Act, an order of the Board directing an employer to recognize a union as the exclusive bargaining agent of its employees cannot be enforced unless such petition for certification has been duly and regularly processed by the Board and certification of a representative made pursuant thereto.

ARGUMENT

I.

A PETITION FOR CERTIFICATION HAVING BEEN FILED PURSUANT TO SECTION 9 (c) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, AN EMPLOYER MAY NOT BE FOUND GUILTY OF VIOLATING SECTION 8 (a)

(5) OF THE ACT IN THE ABSENCE OF A CERTIFICATION BY THE BOARD OF A REPRESENTATIVE OF ITS EMPLOYEES CHOSEN AS SUCH IN A BOARD ORDERED ELECTION.

The Board and the Court below refused to take cognizance of the mandatory language used in Section 9 (c) of the amended Act. By so doing, the decisions below permit a labor organization to deprive employees of the right to choose their bargaining representative in an election. This is accomplished by the simple expedient of filing a petition for certification under Section 9 (c) of the Act alleging that a question of representation affecting commerce exists, and then filing unfair labor practice charges alleging a refusal to bargain under Section 8 (a) (5) of the Act, followed by a withdrawal of the previously filed certification petition without prejudice.

As set forth above, the Union filed a petition for certification (R. 77) on July 18, 1950, eight days after the request for bargaining. On July 31, 1950, the Union filed an unfair labor practice charge alleging a refusal to bargain in violation of Section 8 (a) (5) of the Act (R. 3). Thereafter, the Board permitted the union to withdraw the certification petition without prejudice (R. 77). The Company was notified of this procedure only after the fact had been accomplished.

The effect of the filing of the certification petition, the filing of the unfair labor practice charge and the withdrawal of the petition must be considered in view of Section 9 of the Act, as amended in 1947 by the Taft-Hartley Act. As thus amended, and as pertinent here, Section 9 (c) of the Act reads:

> "Sec. 9 (c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

> (A) by an . . . labor organization . . . alleging that a substantial number of employees (i) wish to be represented for collective bargaining *and that their employer declines to recognize their representative* as the representative defined in subsection (a) of this section . . .; or
>
> (B) by an employer, alleging that one or more . . . labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

The Board *shall* investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists *shall* provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. *If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.*" (Italics Supplied.)

When the foregoing provision of the Act is read in light of Section 9 (c) of the Act before the Taft-Hartley Amendments of 1947, it is manifest that jurisdiction was conferred upon the Board, and when such jurisdiction was invoked it becomes mandatory for the Board to proceed in accordance with Section 9 (c) as amended. Section 9 (c) before the 1947 amendments read:

> "Sec. 9 (c). Whenever a question affecting commerce arises concerning the representation of employees, the Board *may* investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 160 of this title or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives." (29 U.S.C. 159, 49 Stat. 453). (Italics Supplied.)

The tenor and purpose of Section 9 (c) was changed by the

1947 amendments. The amended Act declares that the Board *shall* proceed to a hearing if it has reasonable grounds to believe that a question of representation exists and, if it finds upon the hearing that such a question of representation exists it *shall* direct an election by secret ballot and *shall* certify the results thereof. The original act, on the other hand, only specified that whenever a controversy arose concerning representation the Board *might* investigate such a controversy and *might* take a secret ballot of employees.

Nothing in the legislative history of the 1947 amendments permits the Board to exercise the same discretion with respect to representation hearings that it had under the original Act. Indeed, the Board itself has held, in *Continental Southern,* 83 N.L.R.B. 668, 669, 24 L.R.R.M. 1127 (1949), that a question of representation is raised by a union's claim for representation and a refusal of recognition thereof by the employer. Consistent with such a holding by the Board in that case, the Board should have, in the case herein, provided for an appropriate hearing to determine the question of representation and thereafter direct an election by secret ballot.

But what did the Board do? After the certification petition had been filed by the union—thus putting in issue the question of representation—the Board permitted the union to withdraw the petition and substitute therefor an unfair labor practice charge alleging a refusal to bargain. This was done without notice to the company (R. 77).

In view of existing Board decisions and policy, consider the effect of the foregoing procedure of the Board upon the rights guaranteed the company under Section 9 (c) (1) (B) of the Act, *supra,* which permits an employer to petition for certification. To begin with, the Board has held both before and after the 1947 amendments that the filing of an unfair labor practice charge under Section 8 of the Act will postpone the processing

of a certification proceeding under Section 9 (c) of the Act. (*Cf. Semet-Salvay Co.* 7 N.L.R.B. 511, 2 L.R.R.M. 302 (1938), *American Machine & Foundry Co.* 14 N.L.R.B. 497, 4 L.R.R.M. 450 (1939), *Atlantic Co.*, 65 N.L.R.B. 1274, 17 L.R.R.M. 285 (1946), *Acme Brewing Co.*, 72 N.L.R.B. 1005, 19 L.R.R.M. 1239 (1947), *Columbia Pictures Corp.* 81 N.L.R.B. 1313, 23 L.R.R.M. 1504 (1949)). This being the policy of the Board, the company, by a very clever maneuver of the union, was denied the right to have a petition for certification processed which it might otherwise have filed or to have a representation hearing pursuant to the original certification petition filed by the union. In either case, the company was required to defend an unfair labor practice suit without being accorded the right to have determined the representation question which had obviously arisen.

The relationship of the unfair labor practice charge to the representation question that had arisen is further indication that the purpose of the 1947 amendments have been frustrated by the Board in this case. The company has been found guilty by the Court below of a refusal to bargain with the union in violation of Section 8 (a) (5) of the Act. The wage increases by the company were found as a fact by the Board to be but additional violations of the same section of the Act (R. 39, 54-55). But the acts found to have constituted the refusal to bargain had all been committed by the company prior to July 18, 1950, the date of the filing of the union certification petition. The unfair labor practice charge filed by the union (R. 1-4) so claimed and General Counsel at the hearing so stated (R. 405). Therefore, the very circumstances which put in issue the question of representation, that is to say, the refusal to bargain, were used by the Board to avoid its statutory *duty* to conduct a hearing and an election to determine the representative of a majority of the employees for purposes of collective bargaining.

The decision of the Board in *Continental Southern, supra,* which did not involve an unfair labor practice charge but merely a pro-

ceeding under Section 9 (c) of the Act, is testimony enough that the Board understands the purpose of the Taft-Hartley amendments to Section 9 (c) of the Act but studiously avoids their enforcement. Thus, the Board, at page 669 of the *Continental Southern case, supra,* said:

> "The Union contends that the transactions between itself and the Employer since the expiration of the 1947 contract demonstrate that the Employer does not in good faith question the Union's majority among its employees, and that therefore no question of representation exists. This contention is without merit . . . . *In this case, the question of representation, which was raised by the Union's claim for recognition was put in issue when the Employer refused to recognize such claim.* Under these circumstances the Employer had a clear right to file a petition under Section 9 (c) (1) (B). It is immaterial whether or not there may have been any reasonable basis in fact upon which the Employer might question the Union's claim to majority representation." (Italics supplied.)
>
> (See also *Whitney's* 81 N.L.R.B. 75, 77, 23 L.R.R.M. 1297 (1949).)

This decision of the Board read in light of the 1947 amendments to Section 9 (c) of the Act argues that an employer has just as clear a right to a representation hearing under the amended Act where the union had filed a representation petition prior to the filing of the refusal to bargain charge under Section 8 (a) (5) of the Act. Were this not so, all a union would have to do to avoid a free election is do what the union did in this case: File a petition for certification and by the filing of that petition lead the employer to believe that a Section 9 hearing is impending and that there is no necessity on his part to file a petition; then, file an 8 (a) (5) charge alleging that the refusal to bargain occurred *on the same date* as that on which the representation question is alleged to have arisen in the petition for certification; and, then, without notice to the company, dismiss the certification

petition *without prejudice.* Very simple. The employer's rights under Section 9 (c) (1) (B) of the Act are completely abrogated by the filing of a Section 8 (a) (5) refusal to bargain charge—the very refusal to bargain giving rise to the question of representation.

The action of the Board in permitting the union to withdraw its petition for certification is not sanctioned by the amended Act. If so, what is the source of such authority? It could only be found in general language authorizing the Board to adopt such rules, regulations and procedure to effectuate the policies of the Act. This, we believe, is implicit in the original Act. But in view of the mandatory language in the 1947 amendments, Congress must have intended to withdraw such discretion from the Board and imposed upon it the obligation to process such representation questions in accordance with the language of the statute. The Board not having done so, it is respectfully submitted that Petitioner cannot be held to have violated Section 8 (a) (5) of the amended Act, nor can it be compelled to recognize the Union as the exclusive bargaining agent of its employees until and unless a certification of the Union has been made by the Board following the processing of the certification petition.

II.

A PETITION FOR CERTIFICATION HAVING BEEN FILED PURSUANT TO SECTION 9 (c) OF THE ACT, AN ORDER OF THE BOARD DIRECTING AN EMPLOYER TO RECOGNIZE A UNION AS THE EXCLUSIVE BARGAINING AGENT OF ITS EMPLOYEES CANNOT BE ENFORCED UNLESS SUCH PETITION FOR CERTIFICATION HAS BEEN DULY AND REGULARLY PROCESSED BY THE BOARD AND CERTIFICATION OF A REPRESENTATIVE MADE PURSUANT THERETO.

It would seem to be clear that in enacting the amendments to the Act set forth in Section 9 (c) Congress had in mind that when a question of representation arose it would provide an orderly procedure to determine that question. When questions of representation do arise, as in this case, nowhere in the Act is the Board given authority to clothe the union with bargaining power, or to compel the employer to recognize a union except where the Board follows the procedures outlined by the Act itself.

The Act does not authorize the Board to substitute for these procedures in its discretion an unfair labor practice hearing. The Act does not authorize the Board to find and determine the appropriate unit in a complaint case in substitution for the procedure outlined in Section 9 of the Act. The two procedures—that is the representation hearing and the complaint hearing—are governed by different sections of the Act. The representation hearing is governed by Section 9 of the Act, and an unfair labor practice hearing by Section 10 of the Act. The procedure set forth in Section 9 of the Act having been invoked, the Board is without jurisdiction to in effect certify the union as bargaining agent in a proceeding under Section 10 of the Act. This would deprive employer and employee of the obvious safeguards set forth in Section 9.

It is therefore respectfully submitted that the Order of the Board directing petitioner to recognize and bargain with the union is beyond its jurisdiction and therefore invalid.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,
IRVING A. JENNINGS
Attorney for Petitioner

November 12, 1952.

(Appendix Follows)

APPENDIX

Set forth herein are contained the pertinent provisions of Sections 8 (a) (5), 9 (c) (1) (A) and 9 (c) (1) (B) of the National Labor Relations Act, as amended.

"Sec. 8 (a) It shall be an unfair labor practice for an employer—

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a)."

"Sec. 9 * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

6

Office - Supreme Court,
DEC 13 1952

In The Supreme Court

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United States

OCTOBER TERM, 1952

No. 452

MOTOROLA, INC., a corporation,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,

REQUEST TO FILE CORRECTION AND CLARIFICATION OF PETITIONER'S "STATEMENT" BEGINNING AT PAGE 3 OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IRVING A. JENNINGS
619 Title & Trust Building
Phoenix, Arizona

ROBERT N. DENHAM
1025 Connecticut Avenue
Washington 6, D. C.

Attorneys for Petitioner

In The Supreme Court

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States of America:

Upon review and further examination of its Petition for Writ of Certiorari filed herein by Petitioner, Motorola, Inc., it is felt that the "Statement" found on page 3 thereof: "A majority of the employees in question had authorized the union to represent them prior to July 10, 1950" might be construed as an admission on

the part of Petitioner that the union at that time did have a majority. This fact was not admitted by Petitioner and is not now so admitted. By the footnote on page 2 Petitioner intended to say that the facts contained in the "Statement" were as found or concluded by the Board, and did not intend to admit the truth of the facts so found. For this reason Petitioner requests leave of the Court to amend the first full paragraph of the "Statement" beginning on page 2 of the Petition, by deleting the foregoing sentence and substituting an amended paragraph or paragraphs to read as follows:

"STATEMENT

On July 10, 1950 a Business Representative of International Association of Machinists, District Lodge No. 49, called upon the Vice-President of the Company at its Phoenix, Arizona plant (R. 27). The union representative requested recognition as the exclusive bargaining agent for the Machinists, stating that he represented a majority of the Machinists and that he had in his possession signed authorization cards which he was willing that any disinterested party might check in order to substantiate his statements (R. 27-28).

At the hearing before the Trial Examiner herein, the union representative testified that on July 10, 1950, he had 19 signed authorization cards in his possession, which cards were then and there offered and accepted in evidence in this case (R. 28). This was the first time any of the cards referred to were exhibited to Petitioner and made available for inspection (R. 27-28). On the basis of this evidence, the Trial Examiner and the Board made their findings that on July 10, 1950, and thereafter the Board represented a majority of the employees in the Machinists group and thereafter was the exclusive bargaining representative of all employees in the unit which the Trial Examiner and the Board found to be appropriate for purposes of collective bargaining (R. 27). The Company representative informed the union that an answer to the request for bargaining rights would be forthcoming within ten days (R. 28). On July 12, 1950, Piper, the Director of Human Relations of the

Company in Chicago, arrived in Phoenix at the request of the Vice-President as a result of the union demand and in connection with a wage review which, under established Company policy, was then in order. Piper interviewed each of the employees in the appropriate unit, discussed at a meeting of all employees the Company personnel program, and advised the employees of forthcoming wage increases. Pursuant to the Company's well-known general policies, wage increases were instituted on July 17, 1950, and employees in the appropriate unit were granted increases retroactive to June 19, 1950 (R. 29). The Board found as a fact that wage increases of some kind were under consideration in June, 1950, before the union made its demand for recognition, and that, had not the union appeared on July 10, 1950, some increases would have been granted within a reasonably short period (R. 33). The union representative learned of the proposed wage increases on July 14, 1950, and called the Company to advise that in view of the union demand the wage increases were unethical. The Company replied it would be unethical to withhold a wage increase which had already been scheduled (R. 29)."

Respectfully submitted,

IRVING A. JENNINGS
ROBERT N. DENHAM
Attorneys for Petitioner

Dated, Phoenix, Arizona,
December 12, 1952

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Section 9 (a) 13
Section 10 (e) 13

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 452

MOTOROLA, INC., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 426-433) is reported at 199 F. 2d 82. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 54-57, 18-44) are reported at 94 NLRB 1163.

JURISDICTION

The judgment of the court below was entered on September 30, 1952 (R. 433). The petition for a writ of certiorari was filed on November 14, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151 *et seq.*), appear in the Appendix, *infra*, pp. 13-14.

QUESTION PRESENTED

The union representing a majority of petitioner's employees repeatedly requested the petitioner to bargain. The petitioner responded with a series of unfair labor practices. The union thereupon filed a petition for certification with the Board. Petitioner continued its campaign of unfair labor practices designed to destroy the union's majority. The union thereupon withdrew its petition for certification and filed an unfair labor practice charge with the Board. The question presented is whether petitioner may thereafter escape liability for its refusal to bargain because the union was not certified by the Board.

STATEMENT

Following the usual proceedings under the Act, the court below approved the Board's findings that

petitioner had violated Sections 8 (a)(1) and (5) of the Act by refusing to meet and negotiate with the International Association of Machinists, District Lodge No. 49 (herein called the Union), by unilaterally increasing wages without negotiating them with the Union, and by precipitately increasing wages as soon as it learned of the Union's organizational activities, in order to discourage Union membership. Petitioner challenges the decision below only insofar as it upholds the Board's finding that petitioner refused to bargain collectively, in violation of Section 8 (a)(5).

A. The Facts as Found by the Board

By July 7, 1950, 19 of petitioner's 24 machine-shop employees at its Phoenix plant had signed authorization cards designating the Union as their agent for purposes of collective bargaining (R. 27; 65-68, 151, G. C. Ex. 2).[1] On July 10, the Union representative called upon the director of the Phoenix plant, stated that he represented a majority of petitioner's machinists, and requested that the Union be recognized as their bargaining

[1] References to portions of the printed record are designated "R." Wherever a semicolon appears in a series of references, the references preceding the semicolon are to the Board's findings; those following the semicolon are to the supporting evidence. The original documentary exhibits introduced at the Board hearing by the General Counsel and the petitioner (respondent before the Board), which have been filed with the Court, are referred to as "G. C. Ex." or "Res. Ex.", as the case may be.

agent (R. 27-28; 67-72, 192-199). The director answered that the request would have to be referred to the Company's personnel department in Chicago, and that an answer would be forthcoming in ten days (R. 28; 71, 86-87, 195, 227, 233).

On July 12, petitioner's Chicago personnel director arrived in Phoenix, and remained until the afternoon of the 14th (R. 29; 299, 313). On the 13th and 14th he conducted a series of private interviews with each of the hourly paid employees in the plant (R. 29; 116-118, 142, 157, 306-308). On July 13th he also delivered a lecture to the employees, explaining the advantages of petitioner's pension and group insurance plans, and stating that wage increases were in process (R. 29; 119, 309-312). The next day he completed his series of individual interviews, exhibited an "orientation" film to another assembly of the employees, and finished work on a schedule of wage increases for the machinists and other hourly paid workers in the plant (R. 312-313). These increases were put into effect immediately (R. 29; 200, 311-313, G. C. Ex. 5, pp. 4-5), retroactive to June 19 in the case of the machinists' group. The Union representative promptly protested these unilateral wage increases, and endeavored without success to arrange a meeting with the Chicago personnel director (R. 29-30; 72, 73-74, 200, 202, 203, 312, 313).

On July 18, the Union filed with the Board a petition for representation (R. 31; 77). On July 19,

petitioner's Chicago director returned to Phoenix, but failed to meet with the Union representative, who had left the city on a business trip (R. 30; 314-315, 364-365). On July 22, the Union representative called upon the Company's lawyer and was told that the Company would not recognize the Union unless it obtained a Board certification (R. 30; 76). He advised the Union representative not to "fool with the Motorola plant" (R. 75, 371), pointing out that the Company did not recognize unions at any of its plants (R. 30; 75-76). He refused to consent to an election (R. 31; 75-76). On and after July 17, the Company unilaterally instituted several wage increases without consulting the Union (R. 29; G. C. Ex. 5, pp. 7, 22, letter dated October 13, 1950, attached to G. C. Ex. 6). On July 31, the Union filed the unfair labor practice charge which gave rise to this proceeding; at or about the same time it withdrew its representation petition (R. 1, 77, G. C. Exs. 3, 4).

B. The Board's Conclusions of Law

Considering the detailed evidence and findings briefly summarized above, the Board concluded that the Company's failure to recognize and bargain with the Union, on and after July 10, 1950, was not justified by any "good faith doubt" (R. 38) as to the Union's majority in an appropriate unit. Accordingly, the Board found that the Company violated Section 8 (a)(5) of the Act, by pur-

posefully evading its obligation to recognize the Union, and by unilaterally changing the pay rates of the employees in the bargaining unit on and after July 17 (R. 41). Petitioner does not attack the propriety of the Board's further conclusion that this conduct, coupled with the precipitate wage increase of July 14, unlawfully interfered with, restrained, and coerced the employees in the exercise of the self-organizational and collective bargaining rights guaranteed to them by Section 7 of the Act, in violation of Section 8 (a)(1) (R. 41). The Board ordered that respondent cease and desist from these unfair labor practices, bargain collectively upon request, and post appropriate notices (R. 55-57).

C. The Decision of the Court Below

The court of appeals, reviewing the entire record, approved the findings and conclusions of the Board, and decreed that the Board's order be enforced in full (R. 433-437).

ARGUMENT

1. The contention that an employer's duty to bargain arises only after Board determination of the appropriate unit and of the union's majority status has long been rejected as "untenable" (*National Labor Relations Board* v. *Piqua Munising Wood Products Co.*, 109 F. 2d 552, 556 (C. A. 6)) and "frivolous" (*National Labor Relations Board*

v. *Dahlstrom Metallic Door Co.*, 112 F. 2d 756, 757 (C. A. 2)), and poses no issue warranting review by this Court. Where, as here, the union in fact represents a majority of the employees and the employer does not have a *bona fide* doubt of that fact, the employer may not insist on Board certification as a prerequisite to bargaining. This rule is especially significant where, as here, the employer counters the request for bargaining with unfair labor practices intended to dissipate the union's majority. *National Labor Relations Board* v. *National Seal Corp.*, 127 F. 2d 776 (C. A. 2); *National Labor Relations Board* v. *Clarksburg Publishing Co.*, 120 F. 2d 976, 980 (C. A. 4); see also *Lebanon Steel Foundry* v. *National Labor Relations Board*, 130 F. 2d 404, 409 (C. A. D. C.), certiorari denied, 317 U. S. 659; *National Labor Relations Board* v. *Federbush Co.*, 121 F. 2d 954, 956 (C. A. 2); *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 868 (C. A. 2), certiorari denied, 304 U. S. 576, 585; *Idaho Potato Growers* v. *National Labor Relations Board*, 144 F. 2d 295, 307 (C. A. 9), certiorari denied, 323 U. S. 769.

There is no merit to petitioner's argument that the 1947 amendments were designed to repeal this rule and to permit employers to evade their obligation to bargain collectively with the majority representative. There is no support for the contention that Congress intended to permit the employer, while refusing to recognize the majority

representative, to undermine that majority status before an election can be held. The courts of appeals are unanimously agreed that the 1947 amendments had no such effect. *E.g., National Labor Relations Board* v. *Kobritz, d/b/a Star Beef Co.*, 193 F. 2d 8, 14 (C. A. 1); *National Labor Relations Board* v. *Everett Van Kleeck & Co., Inc.*, 189 F. 2d 516, 517 (C. A. 2); *National Labor Relations Board* v. *Inter-City Advertising Co.*, 190 F. 2d 420, 421 (C. A. 4), certiorari denied, 342 U. S. 908; *National Labor Relations Board* v. *Houston & North Texas Motor Freight Lines, Inc.*, 193 F. 2d 394 (C. A. 5), certiorari denied, 343 U. S. 934; *Joy Silk Mills, Inc.* v. *National Labor Relations Board*, 185 F. 2d 732, 741 (C. A. D. C.), certiorari denied, 341 U. S. 914. It is settled that, since the Union represented a majority of the employees in the appropriate unit prior to the employer's campaign to defeat the Union, the Board may not only adjudicate the past unfair labor practice, but may also remedy that violation by ordering the Company to bargain with the Union in the future, without conducting an election to find out whether the Company's anti-union campaign was successful. *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702. The questions which petitioner presents are the same questions which this Court refused to review in *Inter-City Advertising Co.* v. *National Labor*

Relations Board, 342 U. S. 908 (No. 384, 1951 Term).

2. Much of petitioner's brief is devoted to the argument that the Board lacked authority to dismiss the representation proceeding because of the pendency of the unfair labor practice charges.[2] This question is no different from that which this Court refused to review in *Houston & North Texas Motor Freight Lines, Inc.* v. *National Labor Relations Board,* 343 U. S. 934 (No. 656, 1951 Term). The Board's Brief in Opposition in that case pointed out that even if it could be assumed that the Board erred in dismissing the representation proceeding, and that its action is subject to judicial review, the proceeding forms no part of the record in the unfair labor practice proceeding; consequently, the propriety of the Board's action in the representation proceeding cannot be placed in issue in the unfair labor practice proceeding, either in the court below or on review by this Court.

In any event, the Board's action in dismissing the representation proceeding because of the pendency of the unfair labor practice charges was manifestly correct, and *a fortiori* not an abuse of the Board's "wide discretion in determining the procedure necessary to insure the fair and free

[2] The propriety of this action does not appear to be raised in the petitioner's statement of the Questions Presented (Pet. 2), and therefore would not seem to be before this Court.

choice of bargaining representatives by employees.'"[3] Inasmuch as the pending unfair labor practice charges alleged an unlawful refusal to bargain with the Union, a decision in the unfair labor practice case sustaining the charge would necessarily have resulted in an order to bargain, regardless of the outcome of the election which the Union originally sought in the representation proceedings. *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702, 704-705; *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 687; *National Labor Relations Board* v. *P. Lorillard Co.*, 314 U. S. 512, 513; *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 81-82; *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 339-340; *West Texas Utilities Co.* v. *National Labor Relations Board*, 184 F. 2d 233, 240 (C. A. D. C.), certiorari denied, 341 U. S. 939; *National Labor Relations Board* v. *Tower Hosiery Mills, Inc.*, 180 F. 2d 701, 706 (C. A. 4), certiorari denied, 340 U. S. 811; *D. H. Holmes Co.* v. *National Labor Relations Board*, 179 F. 2d 876, 879-880 (C. A. 5). In that event, the holding of the election would have been a useless act; accordingly,

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[3] *Southern S. S. Co.* v. *National Labor Relations Board*, 316 U. S. 31, 37; see also *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 226; *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 458; *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U. S. 324, 330.

the Board properly followed its customary, and judicially approved, course of declining to proceed further with the representation case because of the pendency of the unfair labor practice case. *Kansas City P. & L. Co.* v. *National Labor Relations Board,* 111 F. 2d 340, 358 (C. A. 8); *Warehousemen's Union* v. *National Labor Relations Board,* 121 F. 2d 84, 94 (C. A. D. C.), certiorari denied, 314 U. S. 674; *National Labor Relations Board* v. *Auburn Foundry, Inc.,* 119 F. 2d 331, 334 (C. A. 7).[4] Contrary to petitioner's contention, nothing in the 1947 amendments imposed a mandatory duty upon the Board to proceed in a representation case —to hold an election which the Board itself would thereafter properly set aside. Cf. *Herzog* v. *Parsons,* 181 F. 2d 781 (C. A. D. C.), certiorari denied, 340 U. S. 810.

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[4] *Continental Southern Corp.,* 83 N. L. R. B. 668, relied on by petitioner (Pet. 12-14) is inapposite; no unfair labor practice charges were filed in that case. Further, it was not, as here, the petitioning party which was attempting to dismiss the petition for certfication.

CONCLUSION

The decision of the court below is plainly correct and presents neither a conflict of decisions nor any question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

WALTER J. CUMMINGS, JR.,
Solicitor General.

GEORGE J. BOTT,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

MOZART G. RATNER,
Assistant General Counsel,
National Labor Relations Board.

DECEMBER, 1952.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*) are as follows:

* * * * *

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

Representatives and Elections

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

Sec. 10. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United

States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

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